Supreme Court, U.S.
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No. 95-1498

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. HILL,

Petitioner,

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,

Respondents.

On Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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I. Respondents Have Misstated Facts Regarding Hill's Federal Circuit Appeal And Have Not Assessed The Scope Of That Review Against ADEA Requirements.

Respondents have not challenged the accuracy of Hill's evidence showing that the agency waited until the Merit Systems Protection Board (MSPB) had upheld the firing of Hill to fill his position with a younger employee. Neither have they denied that an open position at Space Division for which Hill judged was well-qualified was used to hire a person "less senior" than Hill, in accordance with desires of management.[1] Respondents have instead relied on the claim that Hill had a "full and fair opportunity to litigate those issues in the Federal Circuit" and "therefore was not free to relitigate those issues in the district court." Opp. Brief, p. 6 (emphasis added). They conclude with the allegation (*Id.* n.3) that "petitioner failed to assert before the MSPB or the Federal Circuit that he was replaced by a younger person."

The latter allegation is simply false, as shown by a file-stamped copy of Hill's pleading to the Federal Circuit on 28 July 1986,[2] more that six months prior to that court's final decision.

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[1] An affidavit executed by Major John G. Gowan (DNM Dkt. No. 386, 6 Nov 86) states, " ... I served as the Deputy Director of the Directorate of Aerospace Studies ("AFCMD/SA") at Kirtland Air Force Base. ... It is my assessment that the promotion of Robert Blankert to the GS-14 grade level is the result of conversion of the slot formerly occupied by Thomas W. Hill ..." In his declaration (*Id.*), Hill adds, "I have worked with both Mr Feuchter and Robert Blankert ... I am personally aware that both individuals are several years younger than I, although I do not know their exact ages." In his deposition William Jacoby, the selecting official for the Space Division position Hill had applied-for, admits that he was looking for a less senior person for the job. (See Supp. Brief, p. 3.)

[2] Petitioner has concurrently submitted a file-stamped copy of the referenced ducument with a request for leave to lodge it and the Federal Circuit docket sheet during Supreme Court review. The docket sheet shows that the appeal was not docketed until April 1986, *i.e.*, four months after Hill had submitted it and had closed one of his bank accounts.

At page 6 of his pleading Hill plainly alleges, "that a younger employee, Robert Blankert, was promoted into his former position." Hill had previously informed the Circuit Court about ongoing District Court discovery. See "Request for Stay ..." (Fed. Cir. Dkt. No. 86-1081, Entry #7, 21 Apr 86),

> "[A]ppellant has been afforded discovery by [the District] Court. He has thus far taken depositions of seven Air Force officials. In addition, on 4 April 1986 the Court Ordered the Department of the Air Force to release to plaintiff several hundred pages of documents ... Appellant has filed a number of the involved documents with the Court as evidence of discrimination and improper agency action. ... [C]ertain findings of the presiding official for the Merit Systems Protection Board (MSPB) are no longer viable ... "

The notice notwithstanding, the Federal Circuit entered an order denying transfer on 17 July 1986. Hill first learned that the Air Force had replaced him with a younger employee on 20 July 1986, and immediately submitted a Request for Admission to the agency (Supp. Brief, p. 2). Without waiting for a response, Hill filed the above-cited pleading with the Federal Circuit alleging his replacement by Blankert. The Circuit Court denied the pleading without comment and proceeded with review on the merits.

Other than a nebulous claim of "jurisdiction and age discrimination", Respondents do not specify "those issues" afforded "full and fair" review by the Federal Circuit. They assert (Opp. Brief, p.7), "The court below, however, did not give preclusive effect to the MSPB's determination of no discrimination. It gave preclusive effect to the Federal Circuit's de novo determination that petitioner had failed to allege a colorable claim of discrimination." Borrowing a phrase from the D.C. Circuit, this is "a distinction without a difference", as the following discussion shows.

Since the Federal Circuit gave no consideration to discovery in the District Court proceeding or to Hill's claim that he had been replaced by the younger Blankert, it follows that review was limited to the contents of the MSPB record. This conclusion is consistent with the opinion in *Hill v. Dept. of Air Force*, 796 F.2d 146 (Fed.Cir. 1986), and the unreported final decision in Hill's case. See Pet. Ap. E herewith, "We must affirm the board's decision because it was supported by substantial evidence and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Court provided a citiation in support of its decision, *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

The citation confirms[3] that the Federal Circuit was constrained by law not to afford Hill *de novo*[4] review of anything, especially the merit of a claim filed in the District Court under provisions of the Age Discrimination in Employment Act (ADEA). See *Hayes*, at 1537, "This court's scope of review of MSPB decisions is defined and limited by statute. ... In applying these criteria, the court recognizes that it should not try to place itself in the shoes of the agency and second-guess it. ... The record need only disclose such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached. ... This has been our consistent view and that of our predecessor, the United States Court of Claims, for many years, both before and after the Civil Service Reform Act of 1978."

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[3] See also *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1096 (Fed.Cir. 1981), *cert. denied*, 454 U.S. 1141 (1982), "In determining whether the Board's decision is supported by substantial evidence the standard is **not** what the Court would believe on a *de novo* appraisal ..."

[4] See *Nabors v. United States*, 568 F.2d 657, 669 (9th Cir. 1978), holding that "[T]he language of 29 U.S.C.§ 633a(c), 'A civil action ... for such legal or equitable relief as will effectuate the purposes of this chapter' would be to us a most unusual way of specifying review on an administrative record."

The courts in the Tenth Circuit have held that the penalty for Hill's failure to allege future replacement by a younger employee at the time of MSPB appeal is loss of right to *de novo* review in District Court, regardless of facts. This conclusion cannot be reconciled with the holdings of *Chandler v. Roudebush*, 425 U.S. 840 (1976), and *Astoria F.S. & L. Ass'n. v. Solimino*, 501 U.S. 104 (1991), denying preclusive effect to administrative findings on discrimination claims of federal employees.[5]

Furthermore, the Solicitor General's position in this petition is inconsistent with his stated position in *Stevens v. Dept. of Treasury*, 500 U.S. 1 (1991). The key issue in *Stevens* was failure to comply with procedures required for obtaining administrative review of age discrimination. After certiorari was granted, the Solicitor General took the position (*Id.*, at 9) that "[A] federal employee who elects agency review of an age discrimination claim need not exhaust his administrative remedies before bringing a civil action." As a result, the Supreme Court reversed the lower court, but declined to rule on the merits of the exhaustion issue, indicating that it would fade with time if not resolved by future litigation. Hill's position, involving an adjudged inadequacy in exhaustion of administrative relief due to MSPB pleading insufficiency, is not substantively different from *Stevens*. The issue has not faded, as the Solicitor General no longer advocates his *Stevens* position, even though it appears in a different manner.

In sum, the lower courts have denied Hill the additional protection of District Court review of an adverse personnel action which Congress has provided to his class. See *O'Connor v. Consolidated Coin Caterers, Inc.*, 116 S.Ct. 1307 (1 Apr 1996). The denial was based not on any District Court finding, but rather, on a bar due to Federal Circuit review of a matter for which that Court has no jurisdiction. Congressional Record, Senate Report No. 969, cited at Pet. Brief, p. 12.

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[5] Federal service hirings and promotions normally require months to accomplish, and it is unlikely that firm discrimination evidence would be available within the 30 days allowed for perfecting an MSPB appeal.

II. The Argument That Federal Employee Privacy Act Claims Are Foreclosed By Construction With The CSRA Is Opposed By Texts Of Controlling Statutes.

In opposing certiorari for the Privacy Act matter, Respondents' again decline to challenge the accuracy of facts[6] (Pet. Ap. A) regarding damages endured by Hill as a direct consequence of agency refusal to timely adjudicate a Special Security File (SSF) generated under Hill's name and social security number. Nor do they dispute the District Court finding that the controlling regulation (DOD 5200.2-R/ AFR 205-32; re Pet. Ap. A-6, Defn. Ex. F) requires that the SSF be adjudicated,

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[6] Essential facts regarding the security records may be summarized as follows. On 24 May 1985 Paul S. Britt generated a Special Security File (SSF) under Hill's name and social security number, accusing Hill of being a thief, amoral, unscrupulous, and other derogatory terms. In mid-August 1985 Major General Bernard L. Weiss, Britt's superior, reviewed the SSF and stated in writing that "the acts attributed to [Hill] did not have adverse security significance" and "the withdrawal of [Hill's] security clearance was unwarranted". (Pet. Ap. A-6, Fact #22). However, the agency refused to adjudicate the SSF, even though its controlling regulation required that the SSF be adjudicated, regardless of other actions taken, including separation (*Id.*, Fact #26). Hill appealed to the MSPB to review the security suspension. However, the MSPB held that the firing action was independent of the security action and refused to consider the security matter in any manner. (See note 10 below.) In the later part of 1985 Hill negotiated separate offers of employment from bd Systems in Torrance, California, and Aerojet Corporation in Azusa, California, at salary levels significantly higher than his former Air Force salary. However, when the two companies submitted forms to the Defense Industrial Security Clearance Office (DISCO) to obtain an interim clearance for Hill, DISCO received information from the Air Force central security computer that Hill was considered unsuitable for holding a security clearance. As a result, both companies withdrew their offers of employment, and Hill was unable to secure employment in his chosen career field for more than a year. The District Court found malicious intent on Britt's part (*Id.*, A-4, Fact # 14) and further found that the sole purpose of the security action was to prevent Hill from obtaining employment in the civilian defense community (*Id.*, A-7, Fact #27).

regardless of any other adverse action taken, including separation. Rather, they claim that Britt's separate, vindictive security action against Hill constituted a "personnel practice prohibited by the CSRA [Civil Service Reform Act]" (Opp. Brief, p. 8) and that "an employee may not assert a Privacy Act claim to challenge a personnel practice prohibited by the CSRA" (*Id.*, p. 9).

On 4 September 1987 the District Court refused to dismiss Hill's Privacy Act cause for damages. Opp. Ap. D. Years later (11 January 1993), in response to another agency motion, the Court decided to dismiss the damages claim for reasons not specified in its order. Pet. Ap. B. Upon appeal, the Tenth Circuit held that the basis for dismissal was construction of the Privacy Act vis-à-vis prohibited personnel practices defined by the CSRA (chapter 23). However, Congress has directed the courts not to construe the CSRA to limit remedies afforded by other statutes, which include the Privacy Act. More specifically, on 9 July 1989 Public Law 101-12 (codified in part at 5 U.S.C. § 1222) became effective.

> **"§ 1222. Availability of other remedies**
> Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

There is no question that the Privacy Act (5 U.S.C. § 552a) lies outside [7] chapter 12 "Merit Systems Protection Board" and is also outside chapter 23 "Merit System Principles", and that section 1221(i) is not applicable to the instant action. There is also no question that section 1222 was directed to the federal courts and that they are bound by its provisions for decisions entered after 9 July 1989.

Clearly, the actions of the District and Circuit Courts

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[7] Hill's Privacy Act cause does not suffer from the plaintiffs' deficiency in *Rivera v. U.S.*, 924 F.2d 948, 954 (9th Cir. 1991), where the Court found no statutory-based cause of action independent of the CSRA.

in 1991 and 1995 violate provisions of the statute.[8] The error is especially egregious when viewed against the background of the purpose of the act (section 2) and Congressional dissatisfaction[9] with (1) the lack of protection afforded to whistleblowers by the MSPB, the Special Counsel, and the federal courts, and (2) a series of federal court decisions, including *Bush v. Lucas*, 462 U.S. 367 (1983), and *U.S. v. Fausto*, 484 U.S. 439 (1988), which have over a period of time expanded the sphere of exclusivity of remedies afforded by the CSRA.

Even if 5 U.S.C. § 1222 had not been enacted, the lower court construction is still improper for the reason that the MSPB determined that the security matter was independent of the firing action,[10] so that Hill's removal would be unaffected by any action the agency might take on the SSF.

For support of their position, Respondents indicate that *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859 (D.C. Cir. 1989), is no longer good case law and casually cite *Kleiman v. Dept. of Energy*, 956 F.2d 335 (1992), which involves a minor, non reviewable position classification dispute labeled by the D.C. Circuit Court (*Id.*, 338) as "not the stuff of which Privacy Act suits are made." A more studied

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[8] A savings provision summarized in Historical and Statutory Notes of the USCA at the beginning of chapter 12 exempts the MSPB, the Special Counsel, and their officers and employees from provisions of the statute for suits commenced prior to its enactment. However, the key issue involved in this Privacy Act matter is not entitlement against the MSPB, but federal court construction of the two statutes in 1991. There is no exemption in P.L. 101-12 for federal court decisions in Privacy Act suits against the Air Force which were pending in July 1989.

[9] See Joint Explanatory Statement, 135 Cong.Rec. S2782-83 (daily ed. March 16, 1989).

[10] See 16 September 85 MSPB order (DNM Dkt. No. 62, MSPB record, vol. II, Item 24), "[T]he presiding official ruled that she will not consider evidence about the suspension of [Hill's] security clearance because it was not the basis for the agency's removal action."

reading of *Kleiman* reveals the following. At 956 F.2d 339, "In short, we think that nothing in *Hubbard [v. U.S. EPA*, 809 F.2d 1 (D.C. Cir. 1986)] can be construed as conflicting with our decision today. [5] ...

[5] This harmony also means that nothing we say today should be taken to cast doubt on *Hubbard's* statement that 'the Privacy Act permits a federal job applicant to recover damages for an adverse personnel action *actually caused* by an *inaccurate* or incomplete record.' 809 F.2d at 5."

See also *Pilon v. U.S. Dept. of Justice*, 73 F.3d 1111 (D.C. Cir. 1996), allowing a Privacy Act suit for damages exceeding one-half million dollars for the unauthorized disclosure of a record by the supervisor of a former federal employee, even though the recipient was already familiar with the record.

Finally, the novel attempt to label untimely-maintained security records[11] designed solely (District Court determination) to prevent Hill's employment outside the Air Force as a prohibited personnel practice under the CSRA is opposed by the text of the CSRA. Positions offered to Hill by Aerojet or bd Systems or any contractor are not "covered positions" within the meaning of 5 U.S.C. § 2802(a)(2)(B) for which the eleven proscriptions set out at section 2802(b) apply. In addition, it would not be possible for the MSPB or the Special Counsel, which the CSRA has charged with responsibility to correct such practices, to discharge their duties if an adverse security action could be defined as a prohibited personnel practice. See *Dept. of Navy v. Egan*, 108 S.Ct. 818 (1988).

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[11] The key Privacy Act issue is failure to timely maintain a system of records, as expressedly required by the Act. If the SSF had been adjudicated within the time specified by the controlling regulation, the matter would have been resolved before DISCO querry. However, Britt's stated intent was that the matter never be cleared. Both bd Systems and Aerojet officials were fully aware of the firing action, but were unconcerned so long as the security issue was resolved, as evidenced by an affidavit filed on Hill's behalf by bd's President. Hill was later employed by bd Systems and worked there for 4 years before establishing own business.

III. Supreme Court Decisions Support Claims Against Federal Employees For Fourth Amendment Torts.

In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held (*Id.*, 385 n. 28) that, "certain actions by supervisors against federal employees, such as wire-tapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme." In a matter involving suit brought by a federal employee against a former supervisor, *Siegert v. Gilley*, 500 US 226, 231 (1991), the Court restated the requirements that the suit must "allege the violation of a clearly established constitutional right" and that "malice is a requisite showing to avoid the bar of qualified immunity" (*Id.*, concurring opinion at 289).

The District Court found that Britt "was involved in monitoring of Plaintiff's telephone conversations at his place of employment and in recruiting others to do the same." Opp. Ap. 7a. The MSPB record (*e.g.*, MSPB Tr., vol 1, 198, 246-8, DNM Dkt. No.62) shows that Bruno Manz and other employees under Britt's supervision eavesdropped and reported to him on Hill's telephone and other conversations, regarding such matters as discussions between Hill and his attorney during divorce proceedings, calls from Hill's marriage counselor, and calls from D.C. Court officials. No other member of Hill's employing organization was subjected to such[12] intru-

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[12] See *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987), refusing to release O'Connor under a claim of immunity accruing from an employment relationship and holding at 1504, "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as investigations of work-related misconduct, should be judged by a standard of reasonableness. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable." See also, *Butz v. Economou*, 98 S.Ct. 2894, 2909 (1978) holding that there is no distinction for purposes of immunity law between Section 1983 claims against state officials (*e.g.*, Ortega) and constitutional claims against federal officials.

sions of privacy in the workplace. *Id.* In addition, during his deposition David W. Hickman, a member of the Staff Judge Advocate at Kirtland, testified that he counseled Britt and cautioned him against violating Hill's constitutional rights.

The District Court repeatedly found malice on Britt's part (Pet. Ap. A-3, 4, 5) and cited the above-referenced section of *Bush*, holding that "Plaintiff properly suggests that Britt's actions were something other than 'personnel actions' within the purview of any statutory scheme." Nevertheless, the Tenth Circuit, *Hill v. Dept. of Air Force*, 884 F.2d 1318, *cert. denied*, 495 U.S. 947 (1990), held that "there is no *Bivens* remedy" and ordered Britt released without certification that his acts were within the scope of his employment.[13]

Conclusion

For the reasons stated, the Supreme Court should issue a summary writ, directing the District Court to find its own facts regarding Hill's claim of age discrimination, following amendment of the complaint to include facts not available at the time suit was filed. In the alternative, the Court should issue a writ, under provisions of 5 U.S.C. § 1222,[14] directing the District Court to set trial of Hill's Privacy Act cause for damages. In the second alternative, certiorari should be granted to resolve the age discrimination, Privacy Act, and constitutional tort issues involved in this petition.

Respectfully submitted.

Thomas W. Hill, Pro Se

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[13] The D.C. District Court held oppositely in a similar action. See *McGregor v. Greer*, 748 F.Supp. 881 (D.D.C. 1990), citing *Bush* and also citing *Schowengerdt v. General Dynamics Corp.* 823 F.2d 1328, 1339 (9th Cir. 1987), as bases for not construing the CSRA to preclude *Bivens* claims against federal employees for fourth amendment violations.

[14] Hill petitioned the Tenth Circuit for a writ regarding the age discrimination cause at the outset of his appeal, and later pled the requirements of Public Law 101-12. See, 10th Cir. No. 95-2017, Dkt. Nos. 8, 56.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

Thomas W. Hill, Petitioner,	)	
v.	)	Appeal No. 86-1081
Department of the Air Force, Respondent.	)	

DECIDED: February 10, 1987

Before SMITH, NEWMAN, and BISSELL, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (board), docket No. DE07528510204, which became final on December 11, 1985, affirming the removal of Thomas W. Hill by the Department of the Air Force, is affirmed.

OPINION

We must affirm the board's decision because it was supported by substantial evidence and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).